

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ZENWORK, INC. f/k/a TECHATLANTIS,
INC.,

Plaintiff,

v.

AVALARA, INC.,

Defendant.

AVALARA, INC.,

Counterclaim
Plaintiff,

v.

ZENWORK, INC. f/k/a TECHATLANTIS,
INC. d/b/a EXAKTO.COM;
1099ONLINE.COM, TAX1099.COM; EZ2290;
EZIFTA; EZEXTENSION; and
FBARONLINE,

Counterclaim
Defendants.

NO. 2:16-cv-01325-RAJ

ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIMS

ANSWER, AFFIRMATIVE DEFENSES AND
COUNTERCLAIMS - 1
No. 2:16-cv-01325-RAJ

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2 Defendant Avalara, Inc. (“Avalara”), in answer to the Complaint of Plaintiff Zenwork,
3
4 Inc. f/k/a TechAtlantis, Inc. (“TechAtlantis”), responds and asserts affirmative defenses and
5
6 counterclaims as follows. All allegations not expressly admitted are denied.
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8 **PARTIES**
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10 1. Avalara admits the allegations in Paragraph 1.
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12 2. Avalara admits the allegations in Paragraph 2 except that it denies the allegations
13
14 regarding principal place of business.
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16 3. Avalara admits the allegations in Paragraph 3.
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18 **JURISDICTION AND VENUE**
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20 4. Avalara admits the allegations in Paragraph 4.
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22 5. Avalara admits the allegations in Paragraph 5.
23

24 **FACTS**
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26 6. Avalara is without sufficient information to admit or deny the allegations in
27
28 Paragraph 6 and therefore denies them.
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30 7. Avalara admits the allegations in Paragraph 7, but denies that these allegations are
31
32 a complete recitation of Avalara’s business activities.
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34 8. Avalara admits the allegations in Paragraph 8.
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36 9. Responding to the allegations in Paragraph 9, Avalara admits that the Agreement
37
38 required TechAtlantis to provide certain web-based services branded as Avalara 1099. Avalara
39
40 otherwise denies the allegations in Paragraph 9.
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42 10. Avalara admits the allegations in Paragraph 10.
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44 11. Avalara admits the allegations in Paragraph 11.
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1 12. Responding to the allegations in Paragraph 12, Avalara admits TechAtlantis sent
2
3 the email attached as Exhibit B to Avalara on January 26, 2016, by which it terminated the
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5 Agreement. Avalara otherwise denies the allegations in Paragraph 12.
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7 13. Responding to the allegations in Paragraph 13, Avalara denies Exhibit B was a
8
9 notice of non-renewal. Avalara is without sufficient information to admit or deny the remaining
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11 allegations in Paragraph 13 and therefore denies them.
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13 14. Avalara admits the allegations in Paragraph 14.
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15 15. Responding to the allegations in Paragraph 15, Avalara admits the quoted
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17 language is contained in the Agreement. Avalara is without sufficient information to admit or
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19 deny the remaining allegations in Paragraph 15 and therefore denies them.
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21 16. Responding to the allegations in Paragraph 16, Avalara admits that the quoted
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23 language appears in the Agreement. Avalara denies the remaining allegations in Paragraph 16.
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25 17. Responding to the allegations in Paragraph 17, Avalara admits TechAtlantis
26
27 issued the invoices attached as Exhibit C. Avalara denies the remaining allegations in Paragraph
28
29 17.
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31 18. Avalara denies the allegations in Paragraph 18.
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33 19. Responding to the allegations in Paragraph 19, Avalara admits it has refused to
34
35 pay TechAtlantis amounts it does not owe. Avalara otherwise denies the allegations in
36
37 Paragraph 19.
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39 20. Avalara denies the allegations in the first sentence of Paragraph 20. Avalara is
40
41 without sufficient information to admit or deny the remaining allegations set forth in Paragraph
42
43 20 and therefore denies them.
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22. Responding to the allegations in Paragraph 22, Avalara refers to and incorporates its responses to Paragraphs 1–22.

24. Avalara denies the allegations in Paragraph 24.

26. Responding to the allegations in Paragraph 26, Avalara admits it has refused to pay amounts due to TechAtlantis it does not owe. Avalara otherwise denies the allegations in Paragraph 26.

28. Avalara denies the allegations in Paragraph 28.

29. Avalara denies the allegations in Paragraph 29.

FIRST AFFIRMATIVE DEFENSE
(Setoff)

The Complaint fails, in whole or in part, because the damages alleged by TechAtlantis are set off by amounts due and owing to Avalara as a result of TechAtlantis' breaches of the Agreement.

SECOND AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

TechAtlantis has failed to mitigate its damages, if any, and to the extent of such failure to mitigate, any damages awarded should be reduced accordingly.

THIRD AFFIRMATIVE DEFENSE
(Estoppel)

TechAtlantis' causes of action are barred by the equitable doctrine of estoppel.

FOURTH AFFIRMATIVE DEFENSE
(Unjust Enrichment)

As a separate defense to the Complaint and each cause of action therein, Avalara alleges TechAtlantis would be unjustly enriched if allowed to recover based on the allegations set forth in the Complaint.

COUNTERCLAIM

PARTIES

1. Avalara, Inc. ("Avalara") is a Washington corporation, with its principal place of business in Seattle, Washington.

2. Zenwork, Inc. f/k/a TechAtlantis, Inc. ("TechAtlantis") is an Arkansas corporation, with its principal place of business in Fayetteville, Arkansas. On information and belief, TechAtlantis does business under the following names: Exakto.com; 1099online.com; Tax1099.com; EZ2290; EZIFTA; EZExtension; and FBARonline.

JURISDICTION AND VENUE

3. This Court has diversity jurisdiction because the parties are citizens of different states and the claims herein exceed \$75,000, exclusive of attorneys' fees and costs. 28 U.S.C. § 1332. This Court also has federal question jurisdiction over Avalara's trademark infringement claims and supplemental jurisdiction over the state law claims because they form part of the same case or controversy as the trademark infringement claims. 28 U.S.C. §§ 1331, 1367.

4. Venue is proper in the Western District of Washington pursuant to 28 U.S.C. § 1391(a), in that a substantial part of the events or omissions giving rise to the claims in this litigation occurred in this district. Venue is also proper in this district because the parties agreed that any dispute between them concerning the agreement at issue herein would be proper only in this district.

FACTS

Avalara, TechAtlantis, and TechAtlantis' Tax1099 Service

5. Avalara is a leading provider of cloud-based services that automate compliance with government tax reporting.

6. In 2014, Avalara was seeking to license technology that would allow Avalara to provide its customers with an Avalara-branded IRS Form-1099 preparation and filing solution. Generally speaking, Form-1099 forms (of which there are a number of variants) are used for reporting various types of income other than wages, salaries and tips. Customers of Avalara1099 could submit additional forms, including 1098, 8809, 3921, 3922, 1042-S, W2, W2-C, 940, 941 and 944.

1 7. In early 2014, Avalara became aware of TechAtlantis, which represents itself as a
2 provider of “IRS-approved cloud-based tax solutions.” Avalara entered a Mutual Non-
3 Disclosure Agreement dated April 11, 2014, which prohibited the parties from disclosing one
4 another’s confidential information (the “NDA”).
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9 8. Among other things, TechAtlantis operates a web-based service, which it markets,
10 among other branding, as “Tax1099,” that “solicits IRS W-9 information; imports payment data
11 through both file import and custom integrations; and manages the creation, validation, filing and
12 distribution of completed IRS 1099 forms” (“Tax1099”).
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17 9. At the time, TechAtlantis described Tax1099 as “an ideal solution for small
18 business, independent accountants, bookkeepers, CPA firms, corporations of all sizes, and third
19 party filers requiring multiple company support,” and touted Tax1099 on the Tax1099.com
20 website as a “1 Stop 1099 Compliance Solution” that was easy to use, had “Guaranteed
21 Accuracy” and provided “Bank Grade Security” of data.
22
23

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26 10. TechAtlantis’ website touted that Tax1099 “allows [users] to add unlimited
27 number of payers (EIN/SSN numbers) to [a] single login account [and] allows [users to] [a]ccess
28 all of [a user’s] payer (client) and recipient information in an easy to navigate drop down list
29 which is organized alphabetically.”
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35 **The Agreement and the Avalara1099 Service**
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37 11. Avalara and TechAtlantis entered into a Reseller Agreement, dated and effective
38 November 24, 2014.
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1 12. Avalara entered into the Agreement based upon, among other things, the
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3 marketing representations by TechAtlantis, which promised to simplify and streamline 1099-
4
5 related reporting requirements, and to provide accurate and error-free filings.
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7 13. TechAtlantis was aware of the importance of TechAtlantis's service to Avalara's
8
9 customers, and that anything less than the highest level of service would reflect poorly on
10
11 Avalara and harm its reputation.
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13 14. Pursuant to the Agreement, TechAtlantis agreed to create, host, operate and
14
15 maintain an Avalara-branded web-based 1099 service that would collect and processes taxpayer
16
17 information, and manage the creation, validation, filing and distribution of completed IRS 1099
18
19 forms, as well as other IRS forms (the "Avalara1099 Service").
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21 15. The Agreement contemplated that Avalara would market and sell the
22
23 Avalara1099 Service to its own customers (each "AVA Customer"), on a "pay-for-use" basis,
24
25 and that the parties would share the revenue from sales of the Avalara 1099 Service.
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27 16. The Agreement also provided that Avalara could market and sell "Avalara 1099
28
29 Prepaid Forms" to AVA Customers, through channels other than Avalara1099 website.
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31 17. The Agreement additionally contemplated that Avalara would sell certain
32
33 "enterprise subscriptions" and enterprise services to AVA Customers.
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35 18. In the course of negotiating the Agreement, the parties specifically discussed the
36
37 sale of enterprise services to AVA Customers, and agreed that Avalara would pay TechAtlantis a
38
39 single annual fee for each individual AVA Customer that purchased enterprise services.
40
41 TechAtlantis was aware that one or more AVA Customers had multiple offices, yet at no time
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45

1 did the parties discuss or agree to a pricing model under which Avalara would pay a separate fee
2
3 per AVA Customer office location.
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5 19. The parties' agreement as to the pricing of enterprise services was memorialized
6
7 in the Agreement, which provides that Avalara would pay TechAtlantis "an annual fee of \$75 for
8
9 each customer that purchases Enterprise services (i.e., enterprise workflow and rights
10
11 management features)."
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13 20. As contemplated under the Agreement, Avalara did in fact enter into agreements
14
15 with AVA Customers to make the Avalara1099 Service, including enterprise services, available
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17 to them. TechAtlantis was aware that Avalara made the Avalara1099 Service available to AVA
18
19 Customers.
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21 21. The course of conduct between the parties reflected treatment of enterprise
22
23 customers as single customers. For example, with respect to one particular customer, Avalara
24
25 customer log-ins were routed through a single "DNA," which is the customer's corporate
26
27 Security Assertion Markup Language (SAML), rather than being stored in
28
29 TechAtlantis/Avalara's system.
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31 **The Avalara1099 Service Provided by TechAtlantis Was Grossly Defective**
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33 22. In early 2015, Avalara identified issues with the Avalara1099 service during this
34
35 initial service offering, but considered them to be "growing pains" that the parties could work
36
37 through. Despite being brought to its attention, TechAtlantis never remedied these deficiencies.
38

39 23. Later during the term of the Agreement, Avalara became aware of multiple
40
41 problems with the Avalara1099 Service, and received numerous complaints from AVA
42
43 Customers.
44
45

1 24. The problems with the Avalara1099 Service included, but were not limited to:

- 2
- 3 • Social security numbers were visible through the envelope window for
- 4 IRS forms that were mailed;
- 5
- 6 • Social Security Numbers were improperly truncated;
- 7
- 8 • Forms were filed late with the IRS because they were not timely printed;
- 9
- 10 • Forms were filed incorrectly with the IRS;
- 11
- 12 • Recipients received W-2's for other individuals;
- 13
- 14 • Unacceptable service disruptions;
- 15
- 16 • SSL encryption issues;
- 17
- 18 • Duplicate filings; and
- 19 • Problems logging into the Avalara1099 Service.
- 20

21 25. As a result of the deficiencies with the Avalara1099 Service provided by

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23 TechAtlantis, Avalara was required to take extensive remedial actions on behalf of AVA

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25 Customers, and such remedial actions continue to this day. These remedial actions include, but

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27 are not limited to, providing refunds to AVA Customers, writing off certain AVA Customer

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29 amounts, providing credit monitoring services to individual taxpayers affected by TechAtlantis'

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31 mistakes (due to social security numbers being viewable in mailings), retaining the services of

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33 other companies to provide the services TechAtlantis was obligated to provide under the

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35 Agreement, and correcting problematic filings.

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37 26. The remedial actions have required a significant expenditure of time, resources

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39 and money by Avalara, and the full extent and costs of the remedial actions that will be required

40

41 to remedy all of the problems caused by the deficient Avalara1099 Service provided by

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43 TechAtlantis are as yet unknown.

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1 27. Unsurprisingly, as a result of the defective Avalara1099 service, Avalara's
2
3 reputation and business relationships with AVA Customers have been damaged. Indeed, one of
4
5 Avalara's largest customers, who experienced extensive problems using the Avalara1099
6
7 Service, pointed to TechAtlantis' deficient performance as amounting to a breach of Avalara's
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9 contractual obligations to it.

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11 **TechAtlantis Incorrectly Invoiced Avalara**
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13 28. In addition to providing a deficient service, TechAtlantis also incorrectly invoiced
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15 Avalara. The errors in invoicing include charging for services not provided or improperly
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17 provided by TechAtlantis, overcharging for services provided by TechAtlantis, and failing to
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19 provide certain volume discounts as provided for in the Agreement.
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21 29. In particular, pursuant to Section 5.3.2 of the Agreement, Avalara was to pay an
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23 annual fee of \$75 for each AVA Customer that purchased enterprise services. Yet, with respect
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25 to one particular AVA Customer, TechAtlantis has invoiced Avalara \$75 for each of the AVA
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27 Customer's offices and franchises. As a result of just this one type of invoicing error,
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29 TechAtlantis has improperly invoiced Avalara for fees totaling more than \$537,000.
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31 30. Although Avalara has attempted on numerous occasions to resolve the invoicing
32
33 errors with TechAtlantis, TechAtlantis has refused to correct the invoices. In fact, as detailed
34
35 below, TechAtlantis decided to hold hostage the data of Avalara and its customers in an effort to
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37 extract this higher payment to which TechAtlantis was not entitled.
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TechAtlantis Terminated the Agreement and Failed to Return AVA Customer Information

31. On January 26, 2016, in the midst of Avalara having to deal with the repercussions of the deficient Avalara1099 Service provided by TechAtlantis, TechAtlantis sent the email attached as Exhibit “B” to the Complaint to Avalara, terminating the Agreement.

32. Soon after TechAtlantis provided the termination notice, Avalara received a demand by an AVA Customer who had experienced significant problems with the Avalara1099 Service for a return of their AVA Customer data, including data for individual taxpayers.

33. The Agreement contains a number of provisions addressing AVA Customer data, and the obligations of the parties with respect to that data upon termination.

34. Pursuant to Section 1.5 and 1.6 of the Agreement, the term “AVA Data” includes “all data created, or otherwise stored and maintained in, AVA Products” which term itself is defined to include, specifically, the Avalara1099 Service.

35. Section 1.7 of the Agreement provides that the term “Confidential Information” includes “customer data.”

36. Section 7.3 of the Agreement provides, in relevant part, that “[e]ach AVA Customer will own all rights in and to the AVA Data provided by such Customer in the course of using the AVA Products or Avalara1099,” and that “AVA (or the respective AVA Customer) retains all ownership rights to the AVA Data and such AVA Data shall be deemed AVA’s Confidential Information.”

37. Section 10.4 of the Agreement provides that, “[u]pon Termination, each party shall promptly return . . . to the other party all Confidential Information.”

38. Avalara has repeatedly requested that TechAtlantis provide Avalara with the data of the AVA Customer that made the demand. However, despite the clear language of the Agreement identifying AVA Customer data as owned by AVA Customers, and despite the Agreement's provision requiring TechAtlantis to return Confidential Information (which includes AVA Customer data) to Avalara upon termination of the Agreement, TechAtlantis has refused to return all of the requested AVA Customer data.

39. Instead, aware that the AVA Customer who requested return of the data has threatened to initiate litigation against Avalara if the requested data is not returned, TechAtlantis has used the circumstance as a point of leverage in an attempt to force Avalara to pay the incorrect invoices as a condition to TechAtlantis' cooperation in returning the AVA Customer data that TechAtlantis clearly has no right to retain.

TechAtlantis Has Disclosed Avalara's Confidential Information and Is Violating Avalara's Trademark Rights.

40. Without Avalara's permission and in violation of the Agreement, TechAtlantis is using Avalara's trademark in advertisements.

41. Without Avalara's consent and in violation of the Agreement and Avalara's rights, TechAtlantis disclosed the Agreement by filing it publicly in this proceeding.

COUNT I
BREACH OF CONTRACT AND BREACH OF WARRANTY

42. Avalara realleges and incorporates by reference the allegations set forth in Paragraphs 1 through 41 of its Counterclaim.

43. Pursuant to the Agreement, TechAtlantis was obligated to provide and maintain a properly functioning Avalara1099 Service.

1 44. Pursuant to Section 11.2 of the Agreement, TechAtlantis represented and
2 warranted Avalara that the Avalara1099 Service it provided to Avalara “would materially
3 conform to its specifications, descriptions and other documentation” and that TechAtlantis would
4 provide its services to Avalara “in a professional manner and in accordance with applicable
5 industry standards.”
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11 45. As described herein, the Avalara1099 Service provided by TechAtlantis did not
12 function properly.
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15 46. Because the Avalara1099 Service provided by TechAtlantis did not function
16 properly, TechAtlantis breached the Agreement, including breaching the representations and
17 warranties it made to Avalara.
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21 47. TechAtlantis was required to return all “Confidential Information,” including all
22 AVA Customer data, to Avalara upon termination of the Agreement.
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25 48. TechAtlantis terminated the Agreement, but has failed to return all AVA
26 Customer data to Avalara as required under the Agreement and despite repeated requests to do
27 so.
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31 49. TechAtlantis’ refusal to return all AVA Customer data constitutes a separate
32 breach of the Agreement.
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35 50. Because of its breaches of the Agreement, TechAtlantis is not entitled to all or a
36 substantial portion of the amounts invoiced to Avalara.
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39 51. As a direct and proximate result of TechAtlantis’ failure to provide a properly
40 functioning Avalara1099 Service, Avalara has incurred substantial expenses in investigating and
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1 attempting to remedy the problems caused by the defective Avalara1099 Service, and will
2
3 continue to incur additional expenses, in an amount to be proved at trial.
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5 52. The Agreement required TechAtlantic to refrain from disclosing the Agreement or
6
7 its terms absent Avalara's permission.
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9 53. TechAtlantic's filing the Agreement in this Court constitutes a breach of contract,
10
11 breaching both the Agreement and the NDA.
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13 54. As a direct and proximate result this disclosure, Avalara has been damaged in an
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15 amount to be proved at trial.
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17 55. The Agreement required TechAtlantic to refrain from using Avalara's trademark
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19 without its permission.
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21 56. TechAtlantic's use of Avalara's trademark in advertisements constitutes a breach
22
23 of contract entitling Avalara to recover damages in and amount to be proved at trial.
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25 **COUNT II**
26 **INDEMNIFICATION**
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28 57. Avalara realleges and incorporates by reference the allegations set forth in
29
30 Paragraphs 1 through 56 of its Counterclaim.
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32 58. Section 11.3 of the Agreement provides that:
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34 Except to the extent arising from the other Party's gross negligence or willful
35 misconduct, each Party will defend and indemnify the other party from and
36 against any third-party claims (including, but not limited to, claims brought by
37 AVA Customers), arising from such Party's own negligence, breach of this
38 Agreement, or violation of a third party's intellectual property.
39

40 59. As described herein, TechAtlantis was negligent and breached the Agreement.
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42 60. As a direct and proximate result of TechAtlantis' negligence and breach of the
43
44 Agreement, Avalara has been subjected to claims by third parties.
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1 61. The claims of the third parties do not arise, in whole or in part, from any gross
2 negligence or willful misconduct on the part of Avalara.
3

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5 62. Consequently, TechAtlantis is obligated to indemnify Avalara for any and all
6 liabilities incurred by Avalara as a result of such third party claims.
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10 **COUNT III**
11 **TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS**

12 63. Avalara realleges and incorporates by reference the allegations set forth in
13 Paragraphs 1 through 62 of its Counterclaim.
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16 64. Avalara developed advantageous business relationships with AVA Customers.
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18 65. Avalara entered into agreements with AVA Customers pursuant to which Avalara
19 made available the Avalara1099 Service.
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22 66. TechAtlantis knew of the relationships between Avalara and AVA Customers.
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24 67. TechAtlantis, pursuant to the Agreement, agreed that AVA Customer data was the
25 property of AVA Customers and that it constituted “Confidential Information” of Avalara.
26

27
28 68. TechAtlantis, pursuant to the Agreement, agreed to return all “Confidential
29 Information” upon termination of the Agreement.
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32 69. TechAtlantis terminated the Agreement, but has refused to return certain AVA
33 Customer data, for the purpose of coercing Avalara into paying invoices it is not obligated to
34 pay.
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37 70. TechAtlantis knew that its refusal to return certain AVA Customer data would
38 damage Avalara’s business relationship with applicable AVA Customers.
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41 71. TechAtlantis’ conduct demonstrates a willful, intentional and malicious disregard
42 for the consequences of its actions.
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1 72. As a direct and proximate result of TechAtlantis' actions, Avalara has sustained
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3 and continues to sustain damage to the business relationships with certain AVA Customers.
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5 73. TechAtlantis' interference is ongoing and Avalara will suffer irreparable harm if
6
7 it is allowed to continue.
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10 **COUNT IV**
11 **CONVERSION**

12 74. Avalara realleges and incorporates by reference the allegations set forth in
13
14 Paragraphs 1 through 73 of its Counterclaim.
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16 75. The AVA Data is owned by Avalara and its customers.
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18 76. Avalara has a possessory right to, and a property interest in the AVA Data.
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20 77. TechAtlantis has intentionally, wrongfully and willfully interfered with and
21
22 appropriated the AVA Data.
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24 78. As a direct and proximate result of TechAtlantis's acts, Avalara has been
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26 damaged in an amount to be proved at trial. Avalara is also entitled to injunctive relief because
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28 TechAtlantis' conversion is ongoing and Avalara will suffer irreparable injury if it is allowed to
29
30 continue.
31

32 **COUNT V**
33 **TRADEMARK INFRINGEMENT**

34 79. Avalara realleges and incorporates by reference the allegations set forth in
35
36 Paragraphs 1 through 78 of its Counterclaim.
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38 80. Avalara owns trademark rights in the name "Avalara." TechAtlantis has used and
39
40 continues to use Avalara's trademark in commerce in connection with the sale of services,
41
42 without authorization and in a manner likely to cause confusion among consumers.
43
44 TechAtlantis' wrongful use of Avalara's trademark constitutes trademark infringement.
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82. Avalara realleges and incorporates by reference the allegations set forth in Paragraphs 1 through 81 of its Counterclaim.

84. Avalara has been damaged by TechAtlantis' unfair business practices. Avalara is also entitled to injunctive relief because TechAtlantis' unfair practices are ongoing and Avalara will suffer irreparable harm if they are allowed to continue.

WHEREFORE, Avalara respectfully requests judgment:

1. Dismissing TechAtlantis' Complaint;
2. Awarding Avalara actual damages in an amount to be proved at trial in addition to punitive damages;
3. Granting preliminary and permanent injunctive relief requiring TechAtlantis to return all AVA Customer data and to cease using Avalara's trademarks;

6. Awarding such other and further relief as the Court deems just and equitable.

Email: mbrown@gordontilden.com

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Michelle Peterson
Michelle Peterson Law, PLLC
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DATED this 3rd day of October, 2016.

s/ Jeffrey M. Thomas
Jeffrey M. Thomas, WSBA #21175